(1) Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MANUEL DE LLANO,

Petitioner,

v.

DUANE BERGLUND, DAVID DANBOM, ALLAN G. FISCHER, MICHAEL GARRISON, RICK D. JOHNSON, ANDY KEOGH, JIM L. OZBUN, JIMMIE RICHARDSON, CHARLES A. SAWICKI, AND SHARON A. SIVERTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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76 pp

Question Presented for Review

A tenured state university professor is fired. At the first hearing in the firing process, a process defined under state law, the hearing body decides there is no allegation of an offense justifying the firing. The firing process provides for no further action. The professor contends that should have been the end of the matter.

Despite the deficiency, the university president overrules the first hearing body, and the firing mechanism proceeds to its ultimate conclusion – the professor is fired.

Under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and its progeny, violation of a state-created procedure is not a deprivation of civil rights, *if* a *meaningful* opportunity to be heard is provided.

Question: If all actions taken after the decision of the first hearing body were taken *ultra vires*, has the process been so **fundamentally unfair** that the professor was denied due process? Put differently, can federal constitutional standards ever be met in an *ultra vires* proceeding?

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CITATIONS OF THIS CASE

de Llano v. Berglund, 142 F.Supp.2d 1165, (D.N.D. 2001), affirmed, 282 F.3d 1031 (8th Cir.2002), petition for rehearing and rehearing en banc denied.

de Llano v. Berglund, 282 F.3d 1031 (8th Cir.2002), petition for rehearing and rehearing en banc denied May 16, 2002.

BASIS FOR JURISDICTION IN THIS COURT

Judgment in the United States District Court for the District of North Dakota was entered on March 19, 2001. App., 45a. On appeal to the United States Court of Appeals for the Eighth Circuit, judgment on appeal was entered on March 13, 2002. App., p. 1a. On denial of the petition for rehearing en banc and rehearing by the panel, judgment was entered on May 16, 2002. App., p. 46a.

This Court has jurisdiction to hear the Petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THE CASE

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42 U.S.C. §1983.

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

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42 U.S.C. §1985(3).

Conspiracy to interfere with civil rights.

* * *

(3) **Depriving persons of rights or privileges.** If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more

persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

NORTH DAKOTA STATE UNIVERSITY POLICY MANUAL, SECTION 350
[Also SBHE Policy Manual Section 605]
(1992 Edition)

I. **OTHER REQUIREMENTS FOR TERMINATION OR DISMISSAL.** A termination of a tenured faculty member [or] a dismissal during the contract period of any faculty member will not become final until the following steps (unless waived by mutual consent of the faculty member and President) have taken place, in the order listed:

* * *

6. A faculty member may ... request an informal and confidential inquiry and report from a Special Review Committee.

The Special Review Committee shall provide such report within thirty days of receiving the request; and

7. If requested by the faculty member within fifteen calendar days after receipt of the report of the Special Review Committee, formal hearing by the Standing Committee on Faculty Rights shall be provided under Section J.

STATEMENT OF THE CASE

In 1985, the Petitioner, Manuel de Llano (Professor), was hired by North Dakota State University (NDSU) as a Professor of Physics and chairman of the department. App., p. 14a. A few years later he was awarded tenure. *Ibid.* In 1990, he was removed from the chairmanship, although he was allowed to keep his tenured professorship. *Ibid*

The Respondents, collectively referred to as NDSU Administrators, had various roles in the events that followed. In February 1994, Respondents Charles Sawicki and Allan Fischer, then respectively chairman of the department and Dean of the College of Arts and Sciences, sent Professor a "Notice of Intent to Terminate," advising Professor that they intended to fire him and referring him to the NDSU Policy Manual for information on his rights. App., p. 3a. *See also* Defendants' Brief in Support of Their Motion for Summary Judgment, Exh. 25, p. 2 (District Court Docket Item 45). On March 9, 1994, Respondent Jim Ozbun (Ozbun), then president of NDSU, sent Professor a Notice of Dismissal. App., p. 3a. *See also* Defendants' Brief in Support of Their Motion for Summary Judgment, Exh. 26 (District Court Docket Item 45). Ozbun explicitly referred Professor to NDSU Policy Manual Section 350(I)(6), stating Professor had 15 days to

"request an inquiry from a Special Review Committee." *Ibid.*, p. 2.

In accordance with the NDSU Policy Manual in effect at the time, Professor requested a hearing before the Special Review Committee (SRC). That committee found in Professor's favor, namely that Ozbun's "'Notice of Dismissal' did not include specific allegations that warranted dismissal." App., p. 4a. *See also*, "Final Report", Exh. I to Defendants' Supplemental Brief in Support of Their Motion for Summary Judgment (District Court Docket Item 61).

Reserving objection over the need to do so, Professor asked for a hearing before the Standing Committee on Faculty Rights (SCFR), the committee that had jurisdiction over appeals *by a professor* from an *unfavorable* SRC decision. *See*, NDSU Policy Manual, §350(I)(7) (1994). Lodging, p. 6. Professor reserved his objection by stating, "As I have not heard from President Ozbun rescinding his 'Notice of Dismissal' letter dated March 9, 1994, I reluctantly ask you to convene the [SCFR]." Letter, Manuel de Llano to Jay Leitch, Presiding Officer of NDSU University Senate, September 9, 1994. Plaintiff's Supplemental Brief Opposing Defendants' Motion for Summary Judgment, Exh. MdL-58 (District Court Docket Item 62).

In the event that forms the basis for this Petition, Ozbun wrote to Professor, advising Professor that Ozbun had "decided to reject the [SRC's] conclusion that sufficient grounds for dismissal were not established." Defendants' Brief in Support of Their Motion for Summary Judgment, Exh. 32 (District Court Docket Item 45). The SCFR was composed of Respondents Duane Berglund, David Danbom, Michael Garrison, Andy Keogh, and Jimmie Richardson. Letter, Garrison to Ozbun, May 12, 1995, including report of SCFR, at 5 (reciting members of committee). Defendants' Brief in Support of Their Motion for Summary Judgment, Exh. 35 (District Court Docket Item 45).

On May 12, 1995, the SCFR approved the firing, and Ozbun followed through with the final steps in the process, firing Professor three days later. App., p. 4a. Professor appealed that decision to the North Dakota State Board of Higher Education (State Board), which upheld the firing. *Ibid.*

On October 20, 1997, Professor filed suit in the United States District Court for the District of North Dakota, asserting various violations of his constitutional rights by Ozbun, Fischer, Sawicki, and the SCFR members. Complaint, District Court Docket Item 1. The suit alleged that all defendants, including Respondents

Rick D. Johnson (who was University Counsel) and Sharon Siverts (who was Vice President for Academic Affairs) had conspired to deprive him of constitutionally protected rights. *Ibid.*, ¶¶7-9. The NDSU Administrators were all sued in their individual capacities. Amended Complaint, ¶21, District Court Docket Item 33.

Among the asserted violations, and the one that forms the basis of this Petition, is that all actions taken after the SRC decision were *ultra vires,* and that the process should have stopped as soon as the SRC decided. Amended Complaint, ¶9, District Court Docket Item 33.

NDSU Administrators moved to dismiss the lawsuit on the grounds that it was barred, under *res judicata,* by an earlier discrimination lawsuit between Professor and NDSU. *de Llano v. North Dakota State University,* 951 F.Supp. 168 (D.N.D. 1997). The District Court, the Honorable Rodney S. Webb presiding, dismissed the case. District Court Docket Item 19. Professor appealed, and that decision was reversed, because "res judicata, in the form of claim preclusion, is not a bar to de Llano's section 1983 claims." *de Llano v. Berglund,* 183 F.3d 780, 782, 80 Fair Empl.Prac.Cas. (BNA) 719 (8th Cir. 1999), rehearing denied (citations omitted).

On remand, NDSU Administrators moved for

summary judgment. Without deciding whether NDSU Administrators had acted *ultra vires*, the District Court, the Honorable Rodney S. Webb presiding, granted the motion. District Court Docket Item 63. Professor appealed that decision, and the Eighth Circuit affirmed. *de Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002). App., pp. 1a-12a. Professor requested rehearing *en banc* and by the panel. That request was denied. App., p. 46a.

Professor now petitions this court for a writ of certiorari, asking that the case be remanded to the Court of Appeals with directions to remand to the District Court with instructions to decide whether Respondents acted *ultra vires* and, if so, to vacate the order granting summary judgment.

ARGUMENT

I. Conspiracy Under the Civil Rights Act.

Under the Civil Rights Act, it is unlawful to "conspire ... for the purpose of depriving ... any person ... of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. §1985. App., p. 47a. A party injured by such a conspiracy "may have an action for the recovery of damages occasioned by such

injury or deprivation, *against any* one or more *of the conspirators." Ibid.*, emphasis added.

It is undisputed that the SRC ruled in Professor's favor and that the NDSU Administrators proceeded to fire Professor after the SRC's decision. Neither the District Court nor the Eighth Circuit decided whether NDSU Administrators acted *ultra vires*. Rather, citing *Loudermill*, each decided it makes no difference. "*Without deciding whether [ ] NDSU violated its own procedures*, the Court concludes that it must reject de Llano's argument. ... '[O]nce a liberty interest has been found, federal law, not state law, determines what constitutes adequate procedural due process.'" District Court Opinion, at 12-13. emphasis added. App., pp. 25a-26a.

Likewise, the Court of Appeals declined to decide the point. "Therefore, even if de Llano is correct that internal procedures were violated, this would at most provide him with a state law cause of action, and not a federal constitutional claim." 282 F.3d at 1035, App., p. 8a.[1]

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[1] Professor recognizes that NDSU Administrators dispute whether the matter should have stopped at the SRC. Defendants' Reply to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, at 9-11

II. Jurisdiction – The Core of Fundamental Fairness.

It is axiomatic that, before a tribunal can hear a controversy, it must have jurisdiction to do so. "The Due Process Clause prohibits a court from imposing its will on persons whose actions do not place them in a position where they reasonably can foresee that they might be called to account in that jurisdiction." *Phillips Exeter Academy v. Howard Phillips Fund*, 196 F.3d. 284, 288 (1st Cir. 1999), citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Although those cases involve jurisdiction over out-of-state defendants, their lessons are helpful nonetheless. **A tribunal without jurisdiction can accomplish nothing.**

The *ultra vires* conduct of NDSU Administrators is what this case is about. "The core of due process is the right to notice and a *meaningful* opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266; 118 S.Ct. 753; 139 L.Ed.2d 695 (1998), citing *Cleveland Board of Education v.*

(District Court Docket Item 60). However, since both the District Court and the Eighth Circuit decided that matter as one of law, certiorari is appropriate to resolve the issue of whether, assuming the matter should have stopped at the SRC, its continuation beyond that point violated Professor's constitutionally protected rights.

Loudermill, 470 U.S. 532, 542; 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), emphasis added. How can any hearing, or any number of hearings, be considered a "*meaningful* opportunity to be heard," if all of those hearings are *ultra vires*? Professor submits the proper answer is that they cannot be. Even a dozen hearings before panels acting *ultra vires* cannot cure the **fundamental defect** in the mechanism by which Professor was fired.

This case is rare because it involves *ultra vires* actors -- namely the NDSU Administrators once the SRC decided in Professor's favor. It defies the notion of due process to contend that an *ultra vires* act, an act beyond the powers of the actor, could ever constitute due process. Although hundreds of cases have cited *Loudermill*, research has not found one holding that an *ultra vires* panel can possibly provide due process. Such an action should be void *ab initio*.

The argument that an *ultra vires* act of itself violates due process has been accepted in the relatively rare occurrences of such an event. For example, the Michigan Court of Appeals held that, in seizing prisoners' bail deposits, and applying those deposits to costs of incarceration, a sheriff acted *ultra vires*. "**In light of [the sheriff's] *ultra vires* acts**, resulting in plaintiffs being deprived of procedural due process of law, ... we ...

order defendant Macomb County to return the ... bond monies." *Mudge v. Macomb County*, 210 Mich.App. 436, 534 N.W.2d 539, 543 (1995), bold-face emphasis added. Significantly helpful to our analysis is that Tanya Mudge was allowed to go forward with her Section 1983 case and address issues of qualified immunity on remand. 534 N.W.2d at 546.

The Tennessee Court of Appeals made a similar comment: "Procedural requirements are considered by the courts to be safeguards against arbitrary exercise of power. Failure to comply with such procedural requirements has been regarded not only as an *ultra vires* act on the part of municipal legislators, *but also as a denial of due process of law.*" *State ex rel. SCA Chemical Services, Inc. v. Sanidas*, 681 S.W.2d 557, 564 (Tenn.App. 1984), emphasis added. See also *Hutcherson v. Criner*, 11 S.W.3d 126 (Tenn.App. 1999).

Professor respectfully submits that, as a matter of law, by proceeding after the SRC's decision, the NDSU Administrators denied Professor due process and he is entitled to relief under the Civil Rights Act.

III. The SRC's Important Role in 1994 -- Later Diluted and Finally Eliminated.

Professor's basic premise – that the SRC's decision should have been final – can be demonstrated by applying tenets of statutory construction. Later changes to the NDSU Policy Manual prove the point. As already noted, the version used in 1994 did not allow the University president to ignore an SRC decision in favor of the faculty member. The Policy Manual simply contained no provision for such a possibility. NDSU Policy Manual, §350(I)(6),(7), limiting appeal of SRC's decision to faculty member. Lodging, p. 6. (With minor variations not relevant to this petition, SBHE Policy Manual §605 and NDSU Policy Manual §350 are identical. References to Sections 605 and 350 are interchangeable.)

Discerning the change is a bit difficult because it was part of an extensive rewriting of the Policy Manual. Accordingly, the 1994 version and the 1995 amendments are reproduced in the Lodging. Lodging, pp. 1-7, 8-18, respectively.

The substantive mechanism for firing a tenured faculty member appeared in subsection 350(I) of the 1994 version. Lodging, p. 6. The reference to appeal to the SRC is in subsection 350(I)(6). *Ibid.*, p. 6, lines 5 to 9 from the

bottom. The reference to an appeal by the faculty member **from** the SRC's decision is in subsection 350(I)(7). *Ibid.*, p. 6, last 4 lines. Significantly, the Manual makes no mention of the opposite situation – appeal by the institution.

Apparently the State Board thought better of this procedural void, filling it the next year. The firing mechanism was moved to subsection 8 (apparently as part of a change to numerals instead of letters for subsections) in the 1995 amendment. Lodging, pp. 13-15, especially new material added in item (c) on Lodging, pp. 14-15, and deletion of old material starting at Lodging, p. 17, 9 lines from the top.

The 1995 amendment reduced the SRC to an advisory role. This was accomplished by an explicit provision allowing the institution to reconsider the SRC's decision: "The institution shall make its decision upon reconsideration and provide written notice to the faculty member of that decision within fifteen days of receipt of the report and recommendation of the Special Review Committee." SBHE Policy Manual §605(8)(c). Lodging, p. 14, last 5 lines. Then the faculty member was allowed to appeal to the SCFR: "The faculty member may, within thirty days of receipt of the decision of the institution upon reconsideration, file an appeal and request for a

formal hearing before the Standing Committee on Faculty Rights, pursuant to section 605.4." SBHE Policy Manual §605(8)(c). Lodging, pp. 14 [last word] -15 [first 5 lines].

Obviously, if Ozbun had authority to ignore the SRC in 1994, there would have been no need to amend the Manual in 1995 to explicitly give him the authority to decide "upon reconsideration." SBHE Policy Manual §605(8)(c). Lodging, p. 14, last 5 lines. Further, the faculty member's right to appeal to the SCFR was expressly based on "receipt of the institution's decision upon reconsideration." SBHE Policy Manual §605(8)(c). Lodging, p. 15, first 2 lines. The version used in 1994 had no such language. NDSU Policy Manual, §350(I)(7). Lodging, p. 6, last 4 lines.

About four years later, the SRC was removed from the picture entirely. All references to the SRC were stricken from the rules. For example, subsection 605.1(c), dealing with appeals to the SRC by probationary faculty dismissed without cause, was repealed entirely. Lodging, pp. 19-20. Likewise, subsection 605.4, dealing with dismissal of probationary faculty for cause, was amended to remove references to the SRC. Lodging, p. 21, overstrikes of "Special Review Committee." Finally, subsection 605.6(c), dealing with dismissal of tenured faculty (such as Professor) was so amended. Lodging, p.

23, overstrikes of "Special Review Committee."

These changes to the Board rules show that, in 1994 at least, the SRC had an important role that was later diminished and finally eliminated altogether. However, since this case involves the 1994 rules, it cannot be rationally denied that in 1994 Ozbun acted *ultra vires* by ignoring the SRC, that the SCFR members acted *ultra vires* by sitting on Professor's case, and that the remaining NDSU Administrators acted *ultra vires* by participating in Professor's firing.

IV. Reasons for Granting Certiorari.

Under Rule 10(a), an accepted reason for granting certiorari is that "the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a). Professor recognizes the high burden borne by a petitioner invoking this provision. With all due respect, Professor submits this is such a case.

As noted, neither the District Court nor the Court of Appeals decided whether the process should have stopped with the SRC. This was not because the parties

had failed to develop or argue the issue. NDSU Administrators vigorously argued that it needn't have done so. Defendants' Reply to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, at 9-11 (District Court Docket Item 60).

The Court of Appeals stated, "We reject this argument because federal law, not state law or NDSU policy, determines what constitutes adequate procedural due process." App., at p. 7a. *de Llano v. Berglund,* 282 F.3d 1031, 1035 (8th Cir. 2002). The District Court held, "Without deciding whether or not NDSU violated its own procedures, the Court concludes that it must reject de Llano's argument. ... the law used to evaluate the process that is due is exclusively federal." App., at p. 28a.

Thus, it cannot be denied that Professor has yet to have a ruling on whether things should have stopped at the SRC.

This Court has described the factors leading it to grant certiorari under what is presently Rule 10(a):

> The New York City Transit Authority refuses to employ persons who use methadone. The District Court found that this policy violates the Equal Protection

> Clause of the Fourteenth Amendment. In a subsequent opinion, the court also held that the policy violates Title VII of the Civil Rights Act of 1964. The Court of Appeals affirmed without reaching the statutory question. The departure by those courts from the procedure normally followed in addressing statutory and constitutional questions in the same case, as well as concern that the merits of these important questions had been decided erroneously, led us to grant certiorari.

New York Transit Authority v. Beazer, 440 U.S. 568, (1979), citing Supreme Court Rule 19(b) (1979), the predecessor to present Rule 10(a).

This Court implicitly decided that it was important to decide whether methadone users can be denied a job. Professor believes his case is even more compelling for supervisory action. This case presents an issue of fundamental fairness – whether a tribunal can act when it lacks jurisdiction to do so. **Proceeding in the absence of jurisdiction is so fundamentally unfair that it impugns federal constitutional protections.** Accordingly, issuance of a petition for certiorari is appropriate.

V. Relief Requested.

Because fundamental fairness requires that a tribunal have jurisdiction to decide, and that decision by a tribunal acting *ultra vires* is a denial of due process, Professor asks that this court grant his petition for certiorari.

Respectfully submitted on August 14, 2002.

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APPENDIX

APPENDIX

OPINION OF CIRCUIT COURT OF APPEALS
282 F.3d 1031
(March 13, 2002)

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-2012

Manuel de Llano, Appellant,

v.

Duane Berglund; David Danbom; Allan G. Fischer; Michael Garrison; Rick D. Johnson; Andy Keogh; Jim L. Ozbun; Jimmie Richardson; Charles A. Sawicki; Sharon A. Siverts, Appellees.

Appeal from the United States District Court for the District of North Dakota.

Submitted: November 13, 2001
Filed: March 13, 2002

Before BYE, HEANEY, and BEAM, Circuit Judges.

[282 F.3d 1033]

BEAM, Circuit Judge.

Manuel de Llano ("de Llano"), formerly an employee of North Dakota State University ("NDSU"), filed this 42 U.S.C. § 1983 suit against several NDSU administrators (collectively, the defendants), alleging that his termination as a tenured physics professor violated his First Amendment and procedural due process rights. The district court[1] granted the defendants' motion for summary judgment, and we affirm.

---

[1] The Honorable Rodney S. Webb, Chief Judge, United States District Court for the District of North Dakota.

[p. 2]

I. BACKGROUND

In 1985, de Llano was hired by NDSU to be a professor of physics and chairman of the department. He was awarded tenure in 1988. Thus began several years of acrimonious relations between de Llano, the NDSU administration and his physics department colleagues. In January 1990, de Llano was removed as chairman at the request of the physics faculty, "to improve the morale of the department and to strengthen the program in physics." After his chairmanship was revoked, de Llano authored a series of derogatory letters concerning various NDSU faculty members. de Llano received several letters from NDSU administrators urging him to cease his

disruptive conduct. In response, de Llano wrote more letters – to the local newspaper, the school newspaper, and the Chancellor and President of the university system. The letters expressed his dissatisfaction with a variety of ongoing conflicts he was having with the department. During the 1992 fall semester, over ninety percent of de Llano's introductory physics class transferred out of his section to a new section opened by the department chair, complaining about de Llano's poor teaching. On November 26, 1993, de Llano was censured by his department for verbally harassing the department secretary. de Llano was also censured for failing to attend faculty meetings.

On February 23, 1994, Science Dean Fischer and Physics Department Chairman Sawicki sent de Llano a "Notice of Intent to Terminate." On March 9, 1994, **[282 F.3d 1033]** President Ozbun sent de Llano a "Notice of Dismissal." The dismissal notice identified six grounds for de Llano's dismissal: (1) complete and utter lack of collegiality and cooperation with peers resulting in three censures making de Llano's **[p. 3]** continued effectiveness in the department impossible; (2) harassed physics department staff; (3) refused to present complaints through proper channels after repeated warnings and misrepresented facts to other university employees; (4) libeled the physics department chair and dean with false accusations; (5) failed to correct deficient

behavior even after receiving two letters of reprimand; and (6) excessive filing of frivolous grievances with the intent to harass employees and supervisors.

Pursuant to NDSU procedure, de Llano requested a hearing before a Special Review Committee ("Review Committee"). On August 15, 1994, the Review Committee found in de Llano's favor, concluding that the Notice of Dismissal did not include specific enough allegations to warrant dismissal. President Ozbun rejected the Review Committee's findings. de Llano asked for a hearing in front of the Standing Committee on Faculty Rights ("Standing Committee"), and on May 12, 1995, the Standing Committee concluded that there was adequate cause for de Llano's dismissal. On May 15, 1995, Ozbun officially fired de Llano, prompting de Llano to appeal to the North Dakota State Board of Higher Education ("the Board"). The Board affirmed de Llano's firing and this lawsuit commenced.

de Llano argues that his firing violated his constitutional rights. He argues that his right to procedural due process was violated because President Ozbun had no authority to reject the Review Committee's findings. de Llano also claims that standards of due process were not met by the dismissal proceeding because he was accused of general violations of university policy and not specific acts. In addition, de Llano argues that the administrators who terminated him conspired to deny

him an impartial opportunity to be heard. de Llano also claims his First Amendment rights were violated because, he [p. 5] avers, his firing was the result of the many letters he wrote publicly criticizing NDSU.

II. DISCUSSION

We review the grant of summary judgment de novo. Calvit v. Minnesota Pub. Schs., 122 F.3d 1112, 1116 (8th Cir. 1997). All evidence and reasonable inferences from the evidence are viewed in the light most favorable to the nonmoving party. Id.

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A. Procedural Due Process Claim

Procedural due process claims require a two-step analysis. First, a plaintiff must prove that as a result of state action the plaintiff was deprived of some life, liberty, or property interest. Second, the plaintiff must prove that the state's deprivation of that interest was done without due process. Krentz v. Robertson Fire Prot. Dist., 228 F.3d 897, 902 (8th Cir. 2000). Here, the defendants concede that de Llano has a property interest in his job; therefore, the only issue is whether he received the process that was due in connection with his firing. Riggins v. Board of Regents of the Univ. of Nebraska, 790 F.2d 707, 710 (8th Cir. 1986).

[p. 6]

The Supreme Court has held that due process requires, prior to termination, that public employees with a property interest in their job must be given notice of the charges against them, an explanation of the evidence, and an opportunity to respond. Cleveland Bd. of Educ. v. Loudermill, [282 F.3d 1035] 470 U.S. 532, 542 (1985). "It should be an initial check against mistaken decisions–essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id. at* 545-46.

In this case, the defendants accorded de Llano the three elements of pretermination due process specifically outlined by Loudermill. de Llano was not only given notice of the charges against him and an explanation of those charges in the Notice of Dismissal sent by the President, he was also given notice several times before the final termination notice that he was treading on thin ice and advising him to reform his disruptive conduct. While these pretermination warnings may not be sufficient, by themselves, to provide de Llano due process, two hearings were also held prior [p. 7] to his termination where evidence was introduced supporting the reasons for his termination. See Young v. City of St. Charles, 244 F.3d 623, 627 (8th Cir. 2001) (two hearings adequate notice under Due Process Clause). These

hearings provided de Llano with an adequate opportunity to present his case before termination. In fact, during a fifteen-hour hearing before the Standing Committee, de Llano's counsel was given the opportunity to question NDSU's witnesses and call his own. "In contrast, the Supreme Court found a violation of procedural due process in Loudermill because the plaintiffs had had no chance to rebut the charges against them before they were fired." Riggins, 790 F.2d at 711. We find de Llano's contention that the Notice of Dismissal only alleged vague accusations to be without merit. The dismissal notice specifically outlined that de Llano's lack of collegiality, harassment of department personnel, refusal to heed prior warnings regarding his conduct, and the excessive filing of grievances were the reasons for his termination.

de Llano contends that President Ozbun had no authority to reject the Review Committee's decision to retain [p. 8] him. He also claims that the Standing Committee was improperly constituted. He argues that these two actions violated the internal rules prescribed by NDSU for termination proceedings. We reject this argument because federal law, not state law or NDSU policy, determines what constitutes adequate procedural due process. Loudermill, 470 U.S. at 541. Minimum procedural requirements are a constitutional guarantee and they cannot be enlarged or reduced by the internal

NDSU handbook outlining termination procedures. Id. Therefore, even if de Llano is correct that internal procedures were violated, this would at most provide him with a state law cause of action, and not a federal constitutional claim.

Once it is determined that de Llano was afforded with notice and an opportunity to [p. 8] be heard in accordance with Loudermill, the constitutional requirement is satisfied. We find that de Llano was provided with more than the basic Loudermill guarantees.

Finally, de Llano argues that his right to due process was violated because the defendants were biased and the hearings provided were a sham because the decisionmakers had already made up their minds to terminate him [p. 9] regardless of the evidence presented. However, de Llano has not come forward with any evidence to support this assertion. "We begin with a presumption that decision-makers are honest and impartial. [The plaintiff] offers no evidence of vindictive behavior beyond his mere statements of belief that the Board members acted in this manner. . . . [The plaintiff's] beliefs have no effect and do not create a genuine issue of material fact [282 F.3d 1036] that would preclude summary judgment." Marler v. Missouri State Bd. of Optometry, 102 F.3d 1453, 1457 (8th Cir. 1996) (internal citations omitted). de Llano cites Brady v. Gebbie, 859 F.2d 1543 (9th Cir. 1988) to support his contention that if

decisionmakers have already made up their minds, a due process violation occurs. However, in Brady the plaintiffs presented evidence that the decision-maker stated, "I don't know what in heaven's name you can tell me . . . that would make me change my mind." Id. at 1554. There is no evidence that any kind of similar comment was made here by any of the several individuals that reviewed the decision to terminate de Llano. In short, de Llano provides no evidence [p. 10] of bias, he merely provides his own unsupported allegations.

B. First Amendment Claim

de Llano contends that he was terminated in violation of his First Amendment rights because of several letters he wrote to the local newspaper, President Ozbun, and the student newspaper criticizing the NDSU administration. The First Amendment is violated when a public employee is terminated as a result of his speech if the employee's speech can be characterized as speech about a matter of public concern. Connick v. Myers, 461 U.S. 138, 146 (1983). This inquiry is a question of law for the court to decide. Id. at 148 n.7. If the speech at issue is found to be constitutionally protected, the plaintiff then bears the burden of showing that the protected speech was a substantial or motivating factor in the decision to terminate him. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). This is a question of fact, but the sufficiency of the evidence to create an issue of

fact is a question of law. Cox v. Miller County R-I Sch. Dist., 951 F.2d 927, 931 (8th Cir. 1991). [p. 11] "In reviewing a sufficiency of the evidence determination, an appellate court must view the facts and all reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party." Id. de Llano authored six letters prior to his termination that he claims were constitutionally protected because they pertained to matters of public concern. To determine whether speech addresses matters of public concern, we examine the content, form, and context of the speech as revealed by the entire record. Connick, 461 U.S. at 147-48. "The form and context are examined to determine whether the public employee speaks as a concerned citizen informing the public that the government is not properly discharging its duties, or merely as an employee speaking about internal practices relevant only to fellow employees." Calvit, 122 F.3d at 1117. An examination of the content of de Llano's letters reveals that most of his commentary, although couched in general terms, related specifically to the ongoing feuds he was having with the defendants. His letters essentially amounted to publicly airing his dissatisfaction with his removal as chair of the physics [p. 12] department and the department's undervaluation of his strong commitment to research. de Llano's letters indicated that he was unhappy with several personnel decisions made by NDSU, ranging from which

people were chosen as department chairs, to the failure of NDSU to rehire a Gulf War veteran. These are precisely the type of "[s]tatements that deal with personnel matters [that] are not generally protected by the First Amendment." Belk v. City of Eldon, 228 F.3d 872, 879 (8th Cir. 2000). One of de Llano's letters criticized the allocation of travel money within departments, although the letter failed to disclose that de Llano himself had been prohibited from travel that **[282 F.3d 1037]** overlapped with one of his classes as a sanction for his inappropriate conduct within the department. Another of de Llano's letters aired his complaint that he was not allowed to bring in a Brazilian scientist to work with him. These are just a few examples of de Llano's pattern of publicly complaining about private disputes that were unique to him and not a matter of public concern.

After thoroughly reviewing de Llano's letters, it appears there are occasional references to comments that are properly **[p. 13]** characterized as issues of public concern. For instance, in one of his letters de Llano criticized the growing percentage of nonacademic staff at NDSU. In addition, in one of his letters he cited the rising salaries of NDSU administrators as evidence that money was being poorly spent. "We generally have held that speech about the use of public funds touches upon a matter of public concern." Kincade v. City of Blue Springs, 64 F.3d 389, 396 (8th Cir. 1995). However, there is no

evidence in the record that these few comments on matters of public concern were a substantial or motivating factor in the decision to terminate him. Doyle, 429 U.S. at 287. We are unable to ascertain any evidence that he was terminated because of the letters he wrote to the various venues. The
dismissal notice given to de Llano outlines a number of reasons for his termination and those reasons were substantiated in two separate hearings. Not one of the reasons stated for his termination related to de Llano's letters. The fact that de Llano publicly criticized NDSU administrators, and that some of the criticism is constitutionally protected, is insufficient to carry his burden [p. 14] of establishing that the letters were a substantial factor in the termination decision. Cox, 951 F.2d at 932. We conclude that as a matter of law, even when viewed in the light most favorable to the plaintiff, the record establishes that de Llano failed to meet his burden of showing that his letters were a substantial factor in the decision to terminate him.

III. CONCLUSION

For the reasons stated, the judgment of the district court is affirmed.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

DISTRICT COURT MEMORANDUM AND ORDER
(March 19, 2001)
(142 F.Supp.2d 1165)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Manuel de Llano,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	A3-97-133
	)	
Duane Berglund, David Danbom, Allan G. Fischer, Michael Garrison, Rick D. Johnson, Andy Keogh, Jim L. Ozbun, Jimmie Richardson, Charles A. Sawicki, and Sharon A. Siverts,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. Introduction

Before the Court is defendants' motion for

summary judgment and motion in limine (doc.'s # 45, 49). Plaintiff has resisted the motions (doc.'s # 56, 60). For the reasons set forth below, defendants' motion for summary judgment is GRANTED. Therefore, defendants' motion in limine is rendered MOOT.

II. Background

Dr. Manuel de Llano, the plaintiff in this action, was employed as a professor in the physics department of North Dakota State University (NDSU) from 1985 until 1994; he was tenured in 1989. (1) He was originally hired to chair the department, and he [p. 2] served in that capacity until 1989 or 1990, when he was removed following a request by other members of the department. Without reviewing the details, it is clear that, preceding this request, plaintiff had been involved in a series of disagreements with colleagues over various matters relating to the operation of the department. (2) These disagreements continued after his replacement as chair by Dr. Sawicki, one of the defendants to this action, culminating in a series of written warnings from Sawicki to de Llano concerning his behavior in the department.

These conflicts continued for several years, coming to a head in 1992. On December 3 of that year, Dean Allan G. Fischer, [p. 3] another defendant in this case, issued a Letter of Reprimand to de Llano, criticizing his "poor performance in the classroom and lack of respect for your

fellow faculty members which leads to tension and poor collegial relationships . . . ." Dr. de Llano challenged this letter to the NDSU Special Review Committee ("SRC"), which ultimately found the letter justified. (3) Relations between de Llano and his colleagues apparently did not improve: In November 1993 the physics department censured him for verbally harassing the department secretary. Then, in December 1993, de Llano received a second Letter of Reprimand from Dean Fischer, indicating that, if matters did not improve, de Llano faced "sanctions which may include but are not limited to, zero salary raises and seeking your dismissal . . . ." This also apparently did not stem the tide, however; on February 23, 1994, Dr. Sawicki and Dean Fischer provided de Llano with a notice of intent to terminate, and NDSU President Jim L. Ozbun - another defendant here - provided de Llano with a notice of dismissal on March 9.

Dr. de Llano then appealed his dismissal to the SRC by letter dated April 8, 1994. On August 15, 1994, the SRC issued a report recommending that sufficient grounds for his dismissal did not exist. President Ozbun decided to ignore the recommendation and dismissed de Llano despite it on September 22, 1994. Plaintiff [p. 4] strenuously argues that Ozbun did not have the power to do so; this issue will be addressed later. In any case, de Llano appealed Ozbun's decision to the Standing

Committee on Faculty Rights ("SCFR"), which held a two-day hearing on April 10-11, 1995. Twelve witnesses testified at the hearing, the transcript of which numbers over 500 pages; de Llano was represented by counsel, who cross-examined NDSU's nine witnesses and called three himself. On May 12, 1995, the SCFR issued its recommendation, which found NDSU had adequate grounds to dismiss de Llano. Ozbun adopted these recommendations on May 15, 1995; de Llano's salary and benefits were then terminated.

Dr. de Llano further appealed this determination to the North Dakota Board of Higher Education. A hearing officer issued recommended findings on December 3, 1996, in which she recommended that the SCFR's determination be upheld. On February 20, 1997, the Board of Higher Education adopted the recommendations, thus completing de Llano's journey through the administrative process. He then filed this lawsuit, alleging that various NDSU officers - sued solely in their personal capacities - violated his Fourteenth Amendment Due Process and First Amendment freedom of speech rights.

The First Amendment claim stems from a series of letters to the editor de Llano published in the Fargo Forum and the NDSU Spectrum, NDSU's student newspaper, from June 1993 to July 1995.

[p. 5] In these letters, he expressed his concerns with his treatment as well as other matters. The precise contents of the letters will be discussed in greater detail below, but it is clear that they dealt, at least generally, with de Llano's perceptions of problems at NDSU generally and in the physics department specifically.

III. Analysis

A. Summary judgment standard

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is "material" if it might affect the outcome of a case, and a factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Churchill Bus. Credit, Inc. v. Pacific Mut. Door Co., 49 F.3d 1334, 1336 (8th Cir. 1995).

The basic inquiry for summary judgment purposes is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." However, the nonmovant must do more than merely restate earlier pleadings. See McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 510 (8th Cir. 1995). Thus, mere arguments or allegations are insufficient to defeat summary judgment; the nonmoving party must

advance specific facts to [p. 6] create a genuine issue of material fact for trial. See, e.g., F.D.I.C. v. Bell, 106 F.3d 258, 263 (8th Cir. 1997). This requirement is not satisfied by "mere speculation, conjecture, or fantasy"; rather, it requires sufficient probative evidence to allow a finding in its favor, assuming the evidence is established at trial. See Wilson v. International Business Machines Corp., 62 F.3d 237, 241 (8th Cir. 1995).

B. Plaintiff's claims

1. Due process

Plaintiff first claims that defendants violated his rights protected by the Due Process Clause of the Fourteenth Amendment. As the Eighth Circuit recently explained:

> The Due Process Clause of the Fourteenth Amendment prohibits state governments from depriving "any person of life, liberty, or property, without due process of law . . . ." This clause has two components: the procedural due process and the substantive due process components. "Analysis of either a procedural or substantive due process claim must begin with an examination of the interest allegedly violated," and "[t]he possession of a protected life, liberty, or property interest is

> . . . a condition precedent" to any due process claim. "[W]here no such interest exists, there can be no due process violation." Merely labeling a governmental action as arbitrary and capricious, in the absence of the deprivation of life, liberty, or property, will not support a substantive due process claim.

Singleton v. Cecil, 176 F.3d 419, 424 (8th Cir. 1999) (internal citations omitted) (en banc). Since it is not clear whether plaintiff claims a violation of substantive or procedural due process, the Court will examine both claims.

[p. 7]

a. Substantive due process

Applying these rules, it is readily apparent that plaintiff cannot make out a claim under substantive due process theory. As the Eighth Circuit explained in Singleton, substantive due process "specifically protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Id. at 425 (citing Washington v. Glucksberg, 521 U.S. 702). Thus, substantive due process has generally been limited to "matters relating to

marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, 510 U.S. 266, 272 (1994). Plaintiff's claim for substantive due process based on his job fails to meet this high standard; indeed, the Eighth Circuit has squarely rejected that there is any "occupational liberty" in continued state employment protected by substantive due process, at least for at-will employees. See Singleton, 176 F.3d at 427 (declining to extend substantive due process protection to an at-will state employee).

Further, other circuits have arrived at the same conclusion when considering tenured university professors, such as plaintiff. For example, the Third Circuit has explicitly rejected a claim by a tenured professor that his job conveyed a "fundamental property interest entitled to substantive due process [p. 8] protection." Nichols v. Pennsylvania State University, 227 F.3d 133, 142 (3d Cir. 2000). In so doing, it noted that

> [T]enured public employment is a wholly state-created contract right; it bears little resemblance to other rights and property interests that have been deemed fundamental under the Constitution... Nor does public employment approach the interests "implicit in the concept of ordered liberty like personal choice in matters of

marriage and family."

Id. at 143. This is in accord with the vast majority of circuits which have considered the question. Id. at 142 (citing cases in accord from the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). Thus, there is a clear majority rule that state-created contract rights are not, in and of themselves, entitled to the protections of substantive due process. Id. Therefore, to the extent plaintiff here relies on substantive due process as the basis for his action, he must fail.

b. Procedural due process

The analysis of procedural due process claims is quite different than that for substantive due process. As the Eighth Circuit has recently explained, "Procedural due process claims require a two-step analysis. Initially, a plaintiff must demonstrate that the state deprived him of some 'life, liberty, or property' interest. If successful, the plaintiff must then establish that the state deprived him of that interest without sufficient 'process.'" Krentz v. Robertson, 228 F.3d 897, 903 (8th Cir 2000).

[p. 9] Unlike substantive due process, the property right allegedly deprived in a procedural due process claim must be "created not by the Constitution, but by an independent source such as state law." Riggins v. Board of Regents of the University of Nebraska, 790 F.2d 707, 710 (8th Cir. 1986) (citing Cleveland Board of Education

v. Loudermill, 470 U.S. 532 (1985)). However, while the property right must derive from state law, the amount of process due is judged not by reference to state law, but the Federal Constitution. Loudermill, 470 U.S. at 541. Thus, while de Llano must prove a protected property right by reference to state law, the amount of process he must be accorded is judged by federal, not state, law. Id.

The Court has little trouble finding that plaintiff had a protected property right in his job. As the Eighth Circuit has explained, "For a property interest to arise, a government employee must have a 'legitimate claim of entitlement' to continued employment, as opposed to a mere subjective expectancy." Batra v. Board of Regents of University of Nebraska, 79 F.3d 717, 720 (8th Cir. 1996). Here, plaintiff became tenured in his position in 1989. Courts have generally agreed that tenure gives a college professor an expectation of continued employment sufficient to confer on the job the status of a property right. See Geddes v. Northwest Mo. State Univ., 49 F.3d 426, 429 (8th Cir. 1995) ("Absent unusual circumstances, a teacher in a [p. 10] position without tenure or a formal contract does not have a legitimate entitlement to continued employment.") Indeed, defendants appear not to dispute that de Llano had a property interest in his job that entitled him to due process. The issue thus becomes whether plaintiff received the process he was due.

The Supreme Court has made clear that "[t]he essential requirements of due process . . . are notice and an opportunity to respond." Lowdermill, [*sic*] 470 U.S. at 546. Thus, under the Constitution, irrespective of what rights he or she may enjoy under state law, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. It is clear that de Llano enjoyed these opportunities here.

Simply reviewing the facts makes clear that de Llano received ample due process. He clearly had knowledge of the background problems between him and his colleagues based on the letters from Dr. Sawicki in July and August 1992. He then received a letter of reprimand from Dean Fischer in December 1992, which he contested to the SRC. He was censured by the physics department in November 1993, and he received a second letter of reprimand in December of that year. Clearly, then, he had a general background of the problems that ultimately led to his dismissal.

Then, in February 1994, he received a notice of intent to [p. 11] terminate, a notice which included six separately numbered bases for the decision. The March 1994 dismissal letter from President Ozbun reiterated these six points. Thus, there can be no question that he

had notice of the specific charges against him. He then obtained counsel, who represented and assisted him throughout the remainder of the process. He also has had three separate appeals: The SRC, the SCFR, and the North Dakota Board of Higher Education. Before the SCFR, he was able to call and cross-examine witnesses and present evidence on his behalf. Surely, this qualifies as an "opportunity to be heard" under any sensible definition of the phrase.

Eighth Circuit opinions have rejected procedural due process complaints in instances in which less process than de Llano received here was afforded. For example, in Riggins, the court denied a procedural due process claim when the employee was allowed to read a report alleging misconduct on her part and received an hour and forty minute oral hearing with her supervisor. Riggins, 790 F.2d at 709-11 ("The pretermination process given Riggins, while it did not amount to a formal hearing, satisfies the due process requirements of Loudermill"). Similarly, the Eighth Circuit has upheld against procedural due process attack the dismissal of a tenured university professor who "received prior notice of the charges against him and was represented by counsel in all subsequent proceedings," at which [p. 12] he "took full advantage of his rights to present evidence and to call and cross examine witnesses". See Agarwal v. Board of

Regents of the University of Minnesota, 788 F.2d 504, 508 (8th Cir. 1986). In light of these and similar proceedings, it is apparent that because de Llano unquestionably had ample notice of the charges against him and several opportunities to be heard, he received procedural due process. Id.

Dr. de Llano argues, however, that he was denied procedural due process because NDSU violated its own procedures during the administrative review process. Specifically, he argues President Ozbun had no authority to decide not to follow the recommendation of the SRC that de Llano should not be terminated and that the SCFR, which ultimately found against de Llano, was improperly constituted. Pl.'s Resp. Br. at 10-11, 13. Thus, he maintains that NDSU violated its own procedures, which worked to deprive him of procedural due process. Without deciding whether or not NDSU violated its own procedures, the Court concludes that it must reject de Llano's argument.

Initially, this argument simply misses the crucial division in this area of law: While state law controls whether a public employee has a property interest in continued employment protected by procedural due process, the law used to evaluate the process that is due is exclusively federal. See Loudermill, 470 U.S. at 541. In short, as the Eighth Circuit has explained:

[p. 13] "[O]nce a liberty interest has been found, federal law, not state law, determines what constitutes adequate procedural due process." Franco v. Moreland, 805 F.2d 798, 801 (8th Cir. 1986) (citing Loudermill). Thus, this Court must apply federal standards to determine whether de Llano received sufficient due process, most importantly notice and an opportunity to be heard. The Court has concluded that he did. Therefore, de Llano has received procedural due process, irrespective of whether NDSU followed its internal procedures.

Eighth Circuit precedent, while not answering squarely the question de Llano poses, reinforces this conclusion. For example, in a case dealing with a student dismissal from a graduate program, the Eighth Circuit held that the "University's noncompliance with its own grievance appeal procedures would not violate [plaintiff's] right to procedural due process, because the hearing she received at the department level exceeded the process constitutionally required . . . ." Schuler v. University of Minnesota, 788 F.2d 510, 515 (8th Cir. 1986). While the amount of process due and afforded is different in Schuler than in the instant case, the point stands that deviation from an internal process is only a procedural federal due process violation if it has the effect of denying the aggrieved party the process due under federal standards. Id.

Other courts that have considered this very argument within **[p. 14]** the context of universities have reached a similar conclusion. For example, the First Circuit has held that, even if a university deviates from its procedures, it is not subject to a procedural due process attack so long as "the procedures the University actually follows are fair ones." Newman v. Burgin, 930 F.2d 955, 960 (1st Cir. 1991). Thus, the focus is on evaluating what actually happened in light of federal standards, not the policy allegedly violated. Id.; accord Silva v. University of New Hampshire, 888 F.Supp 293 (D.N.H. 1994). Similarly, the Fifth Circuit has rejected a procedural due process attack based on a claimed violation of university policy, emphasizing that the controlling question was compliance with federal due process standards, which the court found were met. Levitt v. University of Texas at El Paso, 759 F.2d 1224, 1229 (5th Cir. 1985).

These cases support the Court's conclusion that, assuming de Llano is right that NDSU violated its procedures, this cannot help him, since he did in fact receive all the process to which he was due under the Constitution. Rather, the issue is whether de Llano received notice and an opportunity to be heard, [*sic*] the Court concludes he did. Further, the Court notes that de Llano received at least one more hearing after each stage of the proceedings he claims was tainted; he went before

the North Dakota Board of Higher Education after the SCFR's decision, and to both of them after Ozbun's decision. Courts have suggested that flawed hearings [p. 15] may be cured by a later, constitutionally adequate procedure. See Agarwal, 788 F.2d at 508 (noting that the fact the protections of the Fourteenth Amendment may not have been observed before one committee did not establish a violation "in light of the formality of the later proceedings"). Thus, even assuming that there was a violation of NDSU's procedures, de Llano received constitutionally adequate process, both overall and after each alleged violation. In light of these facts, de Llano's contention that his rights were violated must be rejected.

Plaintiff cites Brady v. Gebbie, 859 F.2d 1543 (9th Cir. 1988) for his contention that he should be allowed to show the process accorded him was a sham. Pl.'s Resp. Br. at 9. Plaintiff misreads this case, however. The plaintiff in Brady was held not to have any property interest in his job. Rather, he went to the jury on the theory that his firing deprived him of a liberty interest, a theory which has not been so much as alleged here. Brady, 859 F.2d at 1547. Thus, the case is distinguishable and does not help plaintiff. Id.

In conclusion, then, the Court **GRANTS** defendants' motion for summary judgment as to plaintiff's procedural due process claim. Plaintiff received

all the process due him under federal constitutional standards: He clearly had notice of the charges against him, and he had several opportunities to be heard. Further, his allegation that NDSU violated its own procedures in [*sic*] **[p. 16]** unavailing, since the standard remains whether he received sufficient process under federal standards.

2. First Amendment

Plaintiff next claims his firing was retaliation for exercise of his First Amendment rights, mainly through a series of letters to the editors in local newspapers. In his complaint, he identifies the following letters as leading to his firing:

1. Letter to the *Fargo Forum*, "It's a crisis of leadership at university," 6/20/93;
2. Open letter sent to President Ozbun, "Questions for an NDSU dean from a concerned state taxpayer," 9/11/93;
3. Letter to the *Spectrum*, NDSU's campus paper, "Will SU faculty be consulted for its new leadership," 9/28/93;
4. Letter to the *Fargo Forum*, "University should reinstate Specht," 12/31/93;
5. Letter to the *Fargo Forum*, "NDSU must pursue standards of excellence," 2/18/95;
6. Letter to the *Fargo Forum*, "No one at

university is above accountability," 5/5/95;

7. Letter to the *Fargo Forum*, "Free speech rights quashed by NDSU dean," 7/27/95;

The standards for evaluation of § 1983 First Amendment claims are well established. Plaintiff must "establish the First Amendment protects the speech and the protected speech was a substantial factor in the adverse employment action." Bausworth v. Hazelwood School District, 986 F.2d 1197, 1198 (8th Cir. 1993). The Eighth Circuit recently explained this first step:

> Whether the First Amendment shields a public employee from discharge as a result of her speech requires a two-step judicial inquiry. First, we determine whether the employee's speech can be "fairly characterized as constituting speech on a matter of public concern." Second, if the speech addresses a matter of public concern, we balance the "interests of the [employee], as [p. 17] a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

See Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000)

(citations omitted).

Thus, de Llano must establish that his speech addressed matters of public concern. Id. "Matters of public concern include matters of political, social, and other concern to the community." Id. In employing this framework, derived from Connick v. Myers, 461 U.S. 138(1983), courts must examine the "content, form, and context of the speech as revealed by the entire record." Id. (citing Connick). Only if speech meets this standard does the court perform the balance mandated by Pickering v. Board of Educ., 391 U.S. 563 (1968). Then, if the plaintiff prevails, he must demonstrate that the speech was a motivating factor in his discharge. See Bausworth, 986 F.2d at 1198. Finally, the defendant has a chance to show it would have made the same decision regardless of the speech. See generally Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

Initially, the Court notes the July 27, 1995 letter to the Forum entitled "Free speech rights quashed by NDSU dean" cannot, under any circumstances, be considered in this analysis. The final decision by President Ozbun to terminate de Llano was made on May 15, 1995, following the SCFR report of May 15, 1995. Clearly, a letter published two months after a final termination [p. 18] decision cannot have been the basis for that decision. See Bausworth, 986 F.2d at 1198 (noting that plaintiff must

prove the speech was a motivating factor in the adverse employment action). The Court will therefore not consider this letter. (4) This leaves six letters, which the Court addresses below.

a. *"It's a crisis of leadership at university," Fargo Forum, 6/20/93*

This letter is typical of the themes that will define this analysis. Clearly, it contains elements which appear to address matters of public concern. It is couched in generalities, which further seems to suggest that it is of public concern. At bottom, however, it is not of public concern; rather, it is devoted to airing de Llano's personal grievances with NDSU, containing the speech of an employee, not a member of the public. See Bausworth, 986 F.2d at 1198 ("[S]peech is a matter of public concern when a public employee speaks as a concerned citizen, but not when the employee speaks as an employee.")

The Court must examine the content, form and context of the speech at issue. Id. The form and context weigh in favor of a [p. 19] finding of public concern: A newspaper is a public forum and letters to the editor are traditional means of communicating with the public. It is the content of the letter, however, which undercuts its claim to address matters of public concern. Though it begins with an invocation of concern for the future of NDSU generally, it becomes a series of complaints about

low salaries, research policies, and the relationship between research, publications, and tenure.

These are all matters about which de Llano had long complained: He had a long-running dispute with others in his department and the university on the subject of research and publication, as he believed they - and accordingly he - were undervalued. The letter also complains about "removal of department chairmen with exceptional credentials in mid-academic year, in violation of their contracts"; de Llano himself had been removed as chairman in mid year three years earlier. The letter further contains an indictment of NDSU's Equal Employment Opportunity Services office, with which de Llano had a running feud. In short, then, the letter is a series of long-running complaints de Llano had with various issues at NDSU, complaints not of public concern but rather peculiar to him.

These are the kinds of complaints courts have consistently held not to be matters of public concern. Several of the issues raised by the letter - the relationship between research and [p. 20] tenure, the replacement of department chairs - relate to personnel matters, and "[s]tatements that deal with personnel matters are not generally protected by the First Amendment." See Belk, 228 F.3d at 879. Much of the speech also relates to "internal policies relevant only to fellow employees,"

which the Eighth Circuit has held is not generally protected. See Calvit v. Minneapolis Pub. Schs., 122 F.3d 1112, 1117 (8th Cir. 1997). Finally, the Court notes that de Llano clearly had a personal stake in the issues he raised, a fact which often cuts against a finding of public concern. See Belk, 228 F.3d at 879 ("[S]tatements of 'purely academic interest' to the speaker will be given more protection than those in which she has a personal interest"); see also Tuttle v. Missouri Dep't. of Agric., 172 F.3d 1025, 1034 (8th Cir. 1999) (concluding that plaintiff spoke only as an employee and not as a citizen).

In short, this letter was an expression of de Llano's idiosyncratic concerns and problems with NDSU. These concerns may be couched in terms of generalities, but they remain, ultimately, his concerns. Further, these are the concerns of an aggrieved employee, not those of a member of the public. Therefore, the letter does not address matters of public concern within the meaning of Connick, and it is hence unprotected by the First Amendment. This fact is not altered by the letter's general references to funding and the overall direction of NDSU. [p. 21]

b. "Questions for an NDSU dean from a concerned state taxpayer," open letter to Ozbun, 9/11/93

Many of the above concerns are equally - if not

more - true for this letter. While it begins couched in generalities, it soon becomes merely a lading list of de Llano's complaints. In it, he takes issue with, among other issues, the allocation of travel money within departments, rewards for research, and the criteria for department chairmen - all longstanding complaints of de Llano's, recitation of which is not protected for the reasons cited above. See, e.g., Calvit, 122 F.3d at 1117 (noting internal complaints of interest only to other employees are not generally matters of public concern). It also contains a series of complaints about poor treatment of the physics department, an internal complaint which is not a matter of public concern. Id.

Finally, it degenerates into a series of accusations against the dean, suggesting that a student letter seeking a course alternative to one of de Llano's classes - another personal sore point - was fabricated by the dean and that the dean altered minutes of meetings. These criticisms of a supervisor in his role as supervisor - especially when the speaker has a strong interest in the subject - are not generally matters of public concern. See generally Belk, 228 F.3d at 879 (distinguishing between criticism of a supervisor as a supervisor and as a public official). Thus, the content of the letter suggests it is not of public concern.

[p. 20] Further, the form of the speech weighs against it.

It is clear that private communications are not automatically exempt from the First Amendment and must receive the same analysis as public communications. See Buazard v. Meredith, 172 F.3d 546, 549 (8th Cir. 1999). However, "the internal nature of [an employee's] speech is . . . a factor to be considered." Id. Thus, the fact that the speech was conveyed solely to two university officials, especially when coupled with the Court's analysis of its content, undercuts its claim to address a matter of public concern. In light of these factors, the Court concludes the letter does not address a matter of public concern and is hence unprotected.

c. "Will SU faculty be consulted for its new leadership," The Spectrum, 9/28/93

The Court recognizes that this letter may be a closer call than the last two. It also recognizes that these kinds of calculations cannot be done with arithmetic precision. However, the Court concludes that, on balance, this letter does not address matters of public concern. Again, it is replete with individualized complaints: de Llano's perception that research was not sufficiently rewarded by NDSU; his view that he was unfairly treated when he was not allowed to bring a Brazilian scientist to NDSU; and his dissatisfaction with the NDSU affirmative action office. These complaints are reflections of de Llano's personal grievances and relate mostly to internal

policies, both facts that undercut his public concern claim. See Calvit, 122 F.3d at [p. 23] 1117 (noting speech on internal employment matters generally not public concern); Belk, 228 F.3d at 879 (noting that statements of "academic interest" to the speaker are given more protection).

The letter then embarks on a three-paragraph condemnation of the "lack of trust, confidence - and, hence, communication - between faculty and administrators." The letter accuses administrators of "formulating and imposing their own pet policies, rather than implementing the university's." He calls on the administration to give the faculty a larger role in campus policy generally, and he concludes by calling for the prompt selection of a university president.

These themes appear at first blush to address matters of public concern. However, the Court concludes the letter overall is not entitled to protection. The first half is not of public concern - see above - and this changes the context of the later speech. See Bausworth, 986 F.2d at 1198 (noting that courts must examine the "content, form and context" of speech). Further, the second half revolves around de Llano's perception of the presidential selection process from his perspective as a faculty member, and thus as an employee, not as a member of the public. It is well established that "speech is a matter of public concern

when a public employee speaks as a concerned citizen, but not when the employee speaks as an employee." Id. This undercuts his argument, leading the Court to find the letter is not protected.

[p. 24]

d. "NDSU must pursue standards of excellence," Fargo Forum, 2/18/95

Much of the foregoing analysis applies with equal force to this letter. Though devoid of personal attacks, it too is written from a uniquely faculty perspective, thus suggesting it is spoken as an employee and not as a member of the public. Id. Further, it reflects de Llano's underlying grievances with perceived weak academic standards and his view that research is "currently undervalued at NDSU." These are internal and faculty complaints, not those of a concerned citizen. Id; see also Calvit, 122 F.3d at 1117. Therefore, the Court concludes it is not protected.

e. "University should reinstate Specht," Fargo Forum, 12/31/93 and "No one at university is above accountability," Fargo Forum, 5/5/95

The Court addresses these letters together because they suffer the same flaw: Lack of connection to the underlying issues presented in this litigation. Therefore, assuming without deciding that plaintiff could pass both the Connick public concern requirement and the Pickering

balance on these letters, the Court holds that he could not show that the letters were a motivating factor in the defendants' decision to terminate him. See Bausworth, 986 F.2d at 1198.

The first letter ("University should reinstate Specht") is generally critical of the university, but it criticizes a university decision with regard to another faculty member, not de Llano. Further, the Court cannot find any trace of the issue **[p. 25]** raised by this letter anywhere else in the record, at least not as a major issue; it appears only in this letter and does not appear to be mentioned again. Thus, it is a bare incident of speech unconnected to the claim, and plaintiff cannot show it was a motivating factor in his discharge. See Bausworth, 986 F.2d at 1198. Even at the summary judgment stage, a nonmoving party must advance specific facts to create a genuine issue of material fact for trial, not "mere speculation, conjecture, or fantasy." See Wilson, 62 F.3d at 241, Bell, 106 F.3d at 263. This plaintiff has failed to do with regard to this letter.

The same holds true with regard to the second letter ("No one at university is above accountability"), so the Court will not repeat its analysis. The Court does note briefly, however, that this letter is not even vaguely critical of NDSU; rather, it is an attack on the editorial position of the newspaper in which it was published.

Thus, there is not even a general suggestion that it led to a retributive attack on de Llano from NDSU, and this letter thus cannot support the position that plaintiff was fired for writing it. See Bausworth, 986 F.2d at 1198.

In conclusion, therefore, the Court holds that none of these letters pass the Connick public concern requirement. Therefore, they are not entitled to First Amendment protection. This obviates the need to perform the Pickering balancing test - in which de Llano's interest in speaking would be weighed against [p. 26] NDSU's interest in workplace efficiency - since he has not passed the public concern threshold. See Belk, 228 F.3d at 878 (reviewing analytical framework). Therefore, this issue will not be addressed further.

Assuming that the Court concluded that de Llano could pass both Connick and Pickering, however, it would likely conclude both that the speech was not a motivating factor in his discharge and that the NDSU would have terminated de Llano irrespective of his speech. The Court notes that de Llano has pointed to nothing in the record that would support his contention that these six letters led to his termination. While the nonmovant's burden at summary judgment is not a heavy one, it is not satisfied by "mere speculation, conjecture, or fantasy." See Bell, 106 F.3d at 263. Rather, he must at least point to specific facts to create a genuine issue of material

fact for trial. Wilson, 62 F.3d at 241. This plaintiff has singularly failed to do.

Second, the Court notes NDSU could likely prove it would have terminated de Llano regardless of the speech at issue. (5) NDSU offered six reasons for terminating de Llano in the notice of intent to terminate, reasons reiterated in the ultimate notice of dismissal. These reasons do not reflect, on their face, a concern for de Llano's speech, and the record would seem to substantiate [p. 27] several of them. This at least suggests that the actions by NDSU were not driven entirely by de Llano's speech.

More important, perhaps, is that a review of the events in this case - not performed in detail here - indicates that de Llano's problems with NDSU developed in part over the four-year period between his removal as chair in 1989 and his first speech in 1993; while it may have gone downhill from that point, it was already in serious decline. Thus, this is not a case in which a model employee speaks out and is suddenly beset by problems; rather, the speech and the problems seem to be separate or, at most, concurrent. This provides further support for the Court's conclusion that summary judgment is appropriate.

IV. Conclusion

For the reasons set forth above, the Court

GRANTS defendants' motion for summary judgment. Therefore, defendants' motion in limine is rendered **MOOT.**

IT IS SO ORDERED.

Dated this 19th day of March, 2001,

/s/
Rodney S. Webb, Chief Judge

1. As required at the summary judgment stage, the following recitation of facts is drawn from those the parties agree are undisputed or, where there is a dispute, is presented in the light

[footnotes, p. 2] most favorable to plaintiff. See generally Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The Court notes that its efforts to identify those facts which are disputed and thus must be resolved in favor of plaintiff is made more difficult by the fact that plaintiff did not comply with Local Rule 7.1(B)(2), which requires a party resisting a dispositive motion to file, "separate from the brief, a short and concise statement of the material facts as to which it is contended there exists a genuine issue to be tried." As plaintiff points out,

however, "[m]ost of the critical facts in this case are not in dispute." Pl.'s Resp. Br. at 1.

2. The file in this case makes clear that de Llano was involved in a number of disputes with various individuals at the university for a whole host of reasons. The Court declines to review the precise details of these conflicts, however, because they do not ultimately affect the legal issue before it on summary judgment: Whether there are genuine issues of material fact requiring a trial. Therefore, the Court will refer simply to "conflicts," without attempting to parse the parties' differing explanations of the reasons for them or, frankly, attempting to determine what "really happened" and why. These questions - which veer dangerously close to determining whether the university was justified - are simply outside the scope of this Order.

[footnotes, p. 3]

3. The SRC's determination has apparently not been submitted to the Court, but there seems to be no disagreement that it did not uphold de Llano's challenge.

[footnotes, p. 18]

4. It is tempting, in fact, to ignore all letters after March 9, 1994, when NDSU President Ozbun issued the initial

letter of termination, as it is unlikely the later reviews of this decision considered new information. However, the Court will not do so, since the termination did not become final until over a year later, and de Llano was an active speaker in the interim. Further, while the defendants urge the Court to ignore the final letter - as it will do - they seem to agree that the letters between March 9, 1994 and May 15, 1995 are relevant.

[footnotes, p. 26]

5. The Court asked the parties to submit additional briefing on this point.

DISTRICT COURT JUDGMENT

JUDGMENT
(March 19, 2001)

Pursuant to the Court s Memorandum and Order of the 19th day of March, 2001,

IT IS ADJUDICATED THAT defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ADJUDGED that plaintiff's claims and causes of action are DISMISSED WITH PREJUDICE.

Dated this 19th day of March, 2001.

Edward J. Klecker, Clerk
United States District Court

/s/ Lois Clark
By Deputy Clerk

ORDER DENYING HEARING EN BANC AND PANEL REHEARING
(May 16, 2002)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-2012

Manuel De Llano,
Appellant, v.
Duane Berglund, et al.,
Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
(5128-010199)
May 16, 2002
Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

TITLE 42, UNITED STATES CODE, Section 1983

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

TITLE 42, UNITED STATES CODE, Section 1985

Conspiracy to interfere with civil rights.

* * *

(3) **Depriving persons of rights or privileges.** If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his

person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

NORTH DAKOTA STATE UNIVERSITY POLICY MANUAL, SECTION 350
[Also SBHE Policy Manual Section 605]
(1992 Edition)

I. **OTHER REQUIREMENTS FOR TERMINATION OR DISMISSAL.** A termination of a tenured faculty member [or] a dismissal during the contract period of any faculty member will not become final until the following steps (unless waived by mutual consent of the faculty member and President) have taken place, in the order listed:

* * *

6. A faculty member may ... request an informal and confidential inquiry and report from a Special Review Committee. The Special Review Committee shall

provide such report within thirty days of receiving the request; and

7. If requested by the faculty member within fifteen calendar days after receipt of the report of the Special Review Committee, formal hearing by the Standing Committee on Faculty Rights shall be provided under Section J.

Supreme Court U.S.
FILED
SEP 16 2002
OFFICE OF THE CLERK

No. 02-242

IN THE

Supreme Court of the United States

MANUEL DE LLANO,

Petitioner,

v.

DUANE BERGLUND, DAVID DANBOM, ALLAN G. FISCHER, MICHAEL GARRISON, RICK D. JOHNSON, ANDY KEOGH, JIM L. OZBUN, JIMMIE RICHARDSON, CHARLES A. SAWICKI, AND SHARON A. SIVERTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE AND FACTS

Respondents Duane Berglund, David Danbom, Allan G. Fischer, Michael Garrison, Rick D. Johnson, Andy Keogh, Jim L. Ozbun, Jimmie Richardson, Charles A. Sawicki, and Sharon A. Siverts (hereinafter referred to collectively as the "NDSU Employees") do not dispute the factual allegations set forth in Petitioner Manual de Llano's ("de Llano") Petition for a Writ of Certiorari ("Petition"). However, to provide this Court with a full understanding of the process afforded de Llano at the time of his termination, the NDSU Employees provide the following facts.

In accordance with the NDSU Policy Manual, on February 23, 1994 Dean Allan Fischer and Dr. Charles Sawicki provided de Llano with a written notice of intent to terminate. (Appendix pp. 110-111). Thereafter, on March 9, 1994, President Jim Ozbun provided de Llano with a written Notice of Dismissal. (Appendix 112-113). In his Notice of Dismissal, President Ozbun identified the following grounds for de Llano's dismissal:

- Complete and utter lack of collegiality and cooperation with peers resulting in 3 censures making de Llano's continued effectiveness in the department impossible;

- Harassed physics department staff;

- Refused to present complaints through proper channels after repeated warnings and misrepresented facts to other university employees;

- Libeled the physics department chair and dean with false accusations;

- Failed to correct deficient behavior even after receiving two letters of reprimand;

- Excessive filing of frivolous grievances with the intent to harass employees and supervisors.

Id.

On March 15, 1994, counsel for de Llano requested additional particularity regarding de Llano's dismissal. On March 22, 1994, de Llano's counsel was provided with copies of de Llano's first and second reprimands, Dr. Sawicki's December 7, 1993 memo setting forth de Llano's inappropriate behaviors and a summary of grievances filed by de Llano. (Appendix p. 117).

Under the relevant NDSU policies, a terminated tenured faculty member has an opportunity to have the termination reviewed by two different committees. The faculty member may first have the termination reviewed by a Special Review Committee ("SRC") which attempts to find a resolution acceptable to both the faculty member and the administration. The SRC process is informal and concludes with the issuance of SRC recommendations. If the SRC recommendations are not adopted by both parties, the faculty member may then have the termination reviewed by the Standing Committee on Faculty Rights ("SCFR"). The SCFR is composed of tenured faculty members chosen by the NDSU Senate. During this internal review process, the faculty member remains employed.

Following President Ozbun's Notice of Dismissal, de Llano requested that his termination be reviewed by the SRC. On April 8, 1994, de Llano sent a letter to the SRC setting forth his reasons for challenging the termination. In his April 8, 1994 letter, de Llano contended that he had completely fulfilled his institutional responsibilities and, therefore, his termination was improper. (Appendix p. 118). Several physics department faculty members also submitted letters to the SRC supporting de Llano's termination.

On August 15, 1994, the SRC issued its report recommending that sufficient grounds for dismissal did not exist. On September 22, 1994, President Ozbun informed de Llano that he was not adopting the SRC's recommendations and was upholding de Llano's termination. (Appendix 140). President Ozbun rejected the SRC recommendation based on its failure to consider de Llano's insubordinate actions in failing to stop his destructive and uncollegial behavior. *Id.*

In response to the President's letter, de Llano wrote a letter to the President dated September 26, 1994 wherein de Llano once again set forth his position and the justifications for his inappropriate actions. (Appendix p. 142). In particular, de Llano stated in his September 26, 1994 letter that the problems in the physics department were caused by Dr. Charles Sawicki editing faculty meeting minutes and not allowing all faculty access to departmental files. *Id.*

De Llano appealed his termination to the SCFR (consisting of NDSU faculty members, Berglund, Danbom, Garrison, Keogh and Richardson). On April 10-11, 1995, a formal hearing was held before the SCFR. At the hearing, de Llano was represented by counsel. During the two-day hearing, de Llano's counsel cross-examined each of

NDSU's nine witnesses and entered several exhibits into evidence. Furthermore, de Llano called three witnesses, including himself.

The SCFR issued its recommendations on May 12, 1995 finding that NDSU established adequate cause to dismiss de Llano. In its Findings of Fact, the SCFR stated:

> . . . We find by clear and convincing evidence that Dr. de Llano engaged in a continuous course of conduct demonstrating a total disregard for professional integrity. After de Llano was removed as Chair at the request of the faculty in the department, he attempted to strike back at the department, the Chair, the Dean and the University. He has intentionally and consciously misrepresented facts about the department, the Dean and the institution for the purpose of discrediting and harming his colleagues. He has knowingly made false accusations of fact regarding the Dean and the Chair, e.g., allegations of ethnic or racial bias. He has been reprimanded twice, and censured on three occasions by his physics department colleagues, but has failed to change his conduct. . . .

(Appendix p. 149).

The SCFR recommendations were adopted by President Ozbun on May 15, 1995 and de Llano's salary and fringe benefits were terminated that same day. (Appendix p. 152).

On May 26, 1995, de Llano appealed his termination to the North Dakota Board of Higher Education. In his appeal to the Board of Higher Education, de Llano never asserted that his federal pre-termination due process rights had been violated.

On December 3, 1996, the Board of Higher Education hearing officer issued her Recommended Findings and Recommended Order. The hearing officer recommended that, based upon the evidence introduced at the SCFR hearing, de Llano's termination be upheld. The Board of Higher Education adopted the hearing officer's recommendations on February 20, 1997. In her findings, the hearing officer specifically found:

> After his termination as chair and prior to his termination from employment, Dr. de Llano deliberately spread false and misleading information within the University, community and State about the Department in an attempt to make it appear the Department was failing under Dr. Sawicki and Dr. Fischer's administration.
>
> . . .
>
> All faculty in the Department testified that Dr. de Llano was not an effective member of the Department. They testified that his conduct had not only substantially impaired Dr. de Llano's ability to fulfill his institutional responsibilities within the Department, but also harmed the Department in that his actions had significantly hindered their effectiveness within the Department.
>
> . . .

> The evidence of record shows that Dr. de Llano's conduct and actions within the Department of Physics had a negative, disruptive effect on the working's of the Department and resulted in significant interference to other faculty and the chair of the Department in the performance of their duties.

(Appendix pp. 162-163).

SUMMARY OF THE ARGUMENT

In his Petition, de Llano challenges the Eighth Circuit Court of Appeals decision affirming the District Court's grant of summary judgment on his Fourteenth Amendment procedural due process claim. De Llano contends that the Circuit Court erred in failing to find that he did not receive a meaningful opportunity to be heard.

In particular, de Llano states in his Petition that the recommendations of the SRC finding that sufficient grounds did not exist for his termination were final and binding upon NDSU's President. Thus, de Llano asserts that the actions of the NDSU Employees after the SRC recommendations violated his federal procedural due process rights. In other words, de Llano argues that certain alleged violations of NDSU's termination policies amount to a federal due process violation.

De Llano's assertion, if true, would at most amount to a state law cause of action and not a federal constitutional claim. De Llano's arguments relating to the SRC relate solely to procedures prescribed by NDSU, not the United States Constitution. Alleged violations of due process in the

deprivation of a protectable interest are to be measured against a federal standard of what process is due and that standard is not defined by state-created procedures.

The federal procedural due process standard adopted by this Court requires notice and an opportunity to be heard. In his Petition, de Llano does not dispute that he was provided ample notice of the basis for his termination. Likewise, de Llano acknowledges that he was provided at least three opportunities to present his side of the story including once to the administration, once to the SRC and once to the SCFR. Accordingly, under the applicable federal law, de Llano received all of the process to which he was due.

Furthermore, de Llano's contention that the SRC decision is final and binding is completely meritless. The NDSU policies unquestionably reveal that the SRC serves as a mediator to resolve disputes early. If the SRC's decision is not mutually acceptable, then the SRC recommendation is non-binding on any of the parties.

Accordingly, the facts and applicable law unquestionably establish that the Eighth Circuit Court of Appeals decision is correct and, therefore, de Llano's Petition should be denied.

REASONS FOR DENYING THE PETITION

In his Petition, de Llano contends that review of this matter by this Court is appropriate since the NDSU Employees' actions in terminating his employment were *ultra vires* and, therefore, violated his federal procedural due process rights.

The exclusive basis set forth by de Llano in support of his *ultra vires* assertion is that NDSU President Ozbun lacked any authority to reject the recommendations of the SRC. De Llano maintains in his petition that the SRC's decision was final and binding on NDSU and its administrators. Accordingly, de Llano contends that even though he subsequently sought review of his termination by the SCFR, any termination actions taken by the NDSU Employees after the SRC decision were *ultra vires* and in violation of his federal procedural due process rights.

De Llano's contention that the allegedly *ultra vires* actions of the NDSU Employees amounts to a federal procedural due process violation is clearly flawed.

1. FEDERAL PROCEDURAL DUE PROCESS RIGHTS BASED UPON FEDERAL LAW, NOT STATE LAW

As de Llano's Petition reveals, his sole request is to have this Court review and interpret NDSU's internal termination policies to determine if the SRC recommendations were final and binding. If de Llano's contentions are, in fact, true, then he may have a viable claim under applicable state law. However, a violation of state procedures does not amount to a violation of federal procedural due process.

Both the District Court and the Eighth Circuit Court of Appeals addressed this very issue and consistently concluded that de Llano's assertion, even if true, would at most amount to a state law cause of action and not a federal constitutional claim.

The procedural process due a terminated tenured government employee under the Fourteenth Amendment was outlined by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, this Court stated:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 546 (citations omitted). *See also Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).

Guided by this Court's decision in *Loudermill*, appellate court's have uniformly concluded that the alleged failure of a state agency to follow its internal regulations or applicable state laws does not amount, in itself, to a violation of federal due process rights.

In *McDarby v. Dinkins*, 907 F.2d 1334 (2d Cir. 1990), the plaintiff, a retired police officer, contended that his federal due process rights had been violated by the failure of the local agency to determine his disability category as required

under the city's administrative code. Finding that the plaintiff had received adequate notice and an opportunity to be heard, the district court granted the defendants' summary judgment motion. The plaintiff appealed the dismissal. On appeal, the Second Circuit Court of Appeals affirmed the dismissal and held:

> Although we question whether the Board's actions satisfy the requirements of the Administrative Code, the Board's failure to adhere to those requirements does not, without more, constitute a deprivation of procedural due process under the federal constitution. . . .
>
> A breach of procedural requirements does not create a due process violation unless an individual was denied a fair forum for protecting his state rights. . . . Indeed, a contrary rule would bring within the scope of section 1983 myriad claimed violations of local laws, thus confusing the separate provinces of state and national laws that are central to our federal system. . . .
>
> . . .
>
> When the minimal due process requirements of notice and hearing have been met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations.

Id. at 1337-1338 (citations omitted).

Likewise, the Fourth Circuit Court of Appeals held in *Riccio v. County of Fairfax*, 907 F.2d 1459 (4th Cir. 1990):

> Alleged violations of due process in the deprivation of a protectable interest are to be measured against a federal standard of what process is due and that standard is not defined by state-created procedures, even when those state-created procedures exceed the amount of process otherwise guaranteed by the federal constitution.

Id. at 1469; *see also Schuler v. University of Minnesota*, 788 F.2d 510, 515 (8th Cir. 1986) (factual issue of University's compliance with internally prescribed procedural rules need not be resolved upon a finding that plaintiff received constitutionally adequate process); *Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993).

As the above-cited appellate decisions establish, NDSU's compliance or non-compliance with internally prescribed procedural rules is irrelevant in determining whether de Llano received constitutionally adequate process. Accordingly, what, if any, binding effect the SRC decision had under state law has no relevance in this Federal due process action. Instead, the sole inquiry under federal procedural due process law is whether de Llano was given notice and an opportunity to present his side of the story.

a. DE LLANO RECEIVED MORE THAN THE REQUIRED NOTICE OF THE BASIS FOR HIS TERMINATION

From the inception of de Llano's efforts to undermine the physics department, de Llano was informed that his behavior was not acceptable and that his behavior must change or he may be dismissed. The notices received by de Llano included:

(1) July 24, 1992 letter from Dr. Sawicki to de Llano wherein de Llano was instructed to resolve departmental problems within the department and to stop harming the department by airing departmental complaints in the university and community (Appendix pp. 34-35);

(2) August 10, 1992 letter from Dr. Sawicki to de Llano again requesting de Llano to stop sending out letters attacking the department (Appendix p. 36);

(3) December 3, 1992 Letter of Reprimand from Dean Fischer to de Llano addressing de Llano's continuing lack of collegiality and poor performance in the introductory physics class (Appendix pp. 43-44);

(4) February 23, 1993 Physics Department Rules of Order enacted in hopes of forcing de Llano to address problems in the department rather than maliciously attacking the department in the community (Appendix pp. 50-53);

(5) March 22, 1993 faculty evaluation signed by de Llano discussing de Llano's failure to change his insubordinate and uncollegial behavior (Appendix pp. 48-49);

(6) November 4, 1993 letter from Dr. Sawicki again addressing de Llano's lack of collegiality and efforts to destroy the physics faculty and dean (Appendix p. 77);

(7) November 26, 1993 censures by the physics department for harassing the department secretary and missing crucial departmental meetings (Appendix pp. 78,82);

(8) December 10, 1993 Second Letter of Reprimand addressing de Llano's failure to change his destructive behaviors despite numerous requests and warnings (Appendix pp. 91-106);

(9) February 23, 1994, Dean Fischer and Chairman Sawicki presented de Llano with a written notice of intent to terminate;

(10) March 9, 1994, President Ozbun presented de Llano with a notice of dismissal;

(11) Review of termination by SRC; and

(12) Hearing before SCFR.

Each of the grounds listed in the notice of intent to terminate and Notice of Dismissal related to the contents of numerous letters, censures and reprimands given to de Llano

since 1992. In addition, on March 22, 1994, de Llano's legal counsel was provided with copies of de Llano's reprimands and the December 7, 1993 memo from Dr. Sawicki discussing de Llano's inappropriate behavior. (Appendix p. 117). Finally, two pre-termination reviews were held where evidence was introduced establishing the basis for de Llano's termination. *See Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001) (notice in the form of two pre-deprivation hearings adequate under Due Process Clause); *Riggins v. Board of Regents of University of Nebraska*, 790 F.2d 707, 710-711 (8th Cir. 1986) (employee received adequate notice when allowed to review report regarding insubordination and had report read to her); and *Agarwal v. Regents of University of Minnesota*, 788 F.2d 504, 508 (8th Cir. 1986) (letter setting forth reasons for professor's termination sufficient under Due Process Clause). Thus, the facts reveal that de Llano had pre-termination notice of the basis for his termination and the evidence supporting it, a point which de Llano does not challenge in his Petition.

b. DE LLANO GIVEN OPPORTUNITY TO PRESENT HIS SIDE OF THE STORY ON SEVERAL OCCASIONS

In addition to receiving more than the required notice, de Llano was also given several opportunities to respond to NDSU's termination decision. In a letter dated April 8, 1994 to the SRC, de Llano set forth his reasons for challenging his termination. (Appendix p. 118). Furthermore, after President Ozbun rejected the SRC's recommendation, de Llano sent the President a letter dated September 26, 1994 wherein he again disputed the basis for his termination. (Appendix p. 142). Finally, during a fifteen hour hearing

before the SCFR on April 10-11, 1995, counsel for de Llano had the opportunity to hear and examine NDSU's witnesses and call witnesses. (Appendix pp. 327-852). Thus, there can be no dispute that de Llano had an opportunity to and did present his side of the story.

As the District and Appellate Courts correctly concluded, de Llano received all of the procedural due process to which he was entitled under federal law. While, according to de Llano, the procedure afforded to him differed from that outlined in the NDSU policies, such alleged discrepancies do not and should not amount to a violation of federal procedural due process. To find such procedural discrepancies a violation of federal due process would require this Court to prescribe how the NDSU Employees should have applied state law. As this Court stated in *State School & Hosp. v. Halderman*, 465 U.S. 89, 106, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984):

> . . . it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

To avoid such an intrusion in this matter, this Court must deny de Llano's Petition for a Writ of Certiorari.

2. FACTS ESTABLISH SRC SERVED AS MEDIATOR AND ITS RECOMMENDATIONS WERE NOT BINDING ON ANY PARTY

In his Petition, de Llano has requested that this Court remand this matter to the Appellate Court to determine whether the NDSU Employees violated the NDSU

termination policies and procedures. While such an inquiry has been strongly discouraged by this Court in its prior rulings, such an inquiry would clearly reveal that the NDSU Employees properly proceeded under state law.

The foundation for de Llano's Petition is the assertion that the NDSU President was bound by the recommendations of the SRC which found sufficient grounds for terminating de Llano did not exist. A review of the applicable NDSU policies and the actions of de Llano unquestionably reveal that such an argument is entirely meritless.

In asserting that the SRC decision is final and binding, de Llano wholly ignores portions of the NDSU Faculty Handbook and Policies in an apparent attempt to mislead this Court. There is absolutely no language in the 1994 policy indicating that the SRC's recommendations were final and binding on the President. In fact, quite the opposite is true. The 1994 NDSU Faculty Manual, acknowledged as the applicable version by de Llano, states at subsection 3.d. of Section A:

> d. The faculty governance structure at each institution shall provide for a Special Review Committee to investigate each alleged violation of this policy on an informal basis without a verbatim transcript or the privilege of cross-examination. **A Special Review Committee shall, within thirty calendar days of its receipt of an allegation of violation, investigate the alleged violation and *attempt to resolve the problem*.** If the problem is not resolved, the Special Review Committee shall refer the matter to the Standing Committee on

> Faculty Rights for formal hearing if this policy provides for such hearing. **Recommendations of the Special Review Committee** shall be reported in writing to the complainant, head of the academic unit or program area, dean or academic vice president, and president. Except by mutual consent of the complainant and the president, no complaint shall be heard by the Standing Committee on Faculty Rights until a Special Review Committee has completed its investigation and attempted a solution.
>
> . . .
>
> *Note: A statement entitled "Policies and Instructions for Special Review Committees" has also been approved by the University Senate and is available from the University Attorney.*

(Appendix pp. 225-226) (emphasis added).

The unambiguous language of subsection 3.d. of Section A reveals that the SRC is simply to serve as a possible resolution source in disputes between NDSU and its faculty. Moreover, subsection 3.d. of Section A references the SRC's duty to issue a recommendation. The common definition of recommend means to "present as worthy of acceptance or trial." Webster's Ninth New Collegiate Dictionary 984 (1987). Subsection 3.d. of Section A's language that the SRC was to "attempt a resolution" and issue "recommendations" reveals that the SRC's decision was in no way binding upon either de Llano or NDSU.

However, if some doubt existed in de Llano's mind after reading subsection 3.d. of Section A, all he needed to do was review the "Policies and Instructions for Special Review Committees," as referenced in a note to subsection 3.d. of Section A. The "Policies and Instructions for Special Review Committees," referred to in the "Note" to Subsection 3(d), were prepared more than ten years before the SRC's report was issued in de Llano's case. (Appendix pp. 220-222). The "Policies and Instructions for Special Review Committees" sheds additional light on the limited, non-binding nature of the SRC's authority:

1. As the above excerpts from the Board regulations state, a Special Review Committee has several functions:

    a. To investigate an alleged violation or case referred to it on an informal basis;

    b. To **attempt to resolve** the problem or case;

    c. If the **problem is not resolved** by the Committee, to **refer the matter to the Standing Committee on Faculty Rights** where the Board regulations provide for that alternative (*See* Section C4 above) and;

    d. To **report recommendations** in writing to the complainant, head of the academic unit or program area, dean or academic vice president, or president.

2. Furthermore, the potential role of the Committee in suggesting and negotiating alternative or creative solutions to the conflict, which might be beyond the advocacy — oriented positions of the parties, should be constantly kept in mind. When such informal efforts at ***mediation fail to reach a mutually acceptable conclusion, the Committee's responsibility for a specific case is terminated by its report*** of its recommendation in writing, and where appropriate, its referral of the case to the Standing Committee on Faculty Rights. . . .

3. At NDSU, the **informal mediation role of the Committee** is supported by a definition of Committee membership which follows the arbitration model . . .

. . .

5. . . . Although **Special Review Committees cannot be expected to resolve every single conflict** or case, the NDSU experience with such committees has been very positive and helpful, so that members appointed to such committees should understand that they have an important and constructive **opportunity to play a key role in the mediation of conflicts**, with the objective of helping the parties to a conflict within the University avoid the expense and delay of a formal hearing or even litigation to resolve the problem.

(Appendix pp. 228-230) (emphasis added).

These provisions of NDSU's Faculty Handbook and Policies clearly refute de Llano's assertions that the SRC decision was final and any subsequent proceedings were a violation of his due process rights. The unambiguous language of the Faculty Handbook and Policies reveals that the SRC simply serves as a mediation[1] source to attempt to resolve conflicts early.

Since the SRC's role was advisory in nature, it is clear that someone else had the final authority. That someone else at NDSU was its President. (Appendix p. 222). And, prior to making that final decision regarding de Llano's dismissal, President Ozbun advised de Llano of his right to appeal to the SCFR, where he would receive a formal hearing. (Appendix p. 141). Since de Llano did request a hearing before the SCFR, it is apparent that he acknowledged the non-binding nature of the SRC's recommendation and, thus, waived any argument that the SRC decision was final.[2] Accordingly, President Ozbun's refusal to adopt the SRC's recommendations was not a violation of de Llano's federal due process rights.

---

1. Mediation is defined as a "[p]rivate informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties." Black's Law Dictionary 981 (6th ed. 1990).

2. In his Petition, de Llano states that an NDSU faculty member may only appeal an "unfavorable" SRC decision to the SCFR. *See* Petition at p. 6. There is absolutely no reference in any NDSU policies stating that only an unfavorable SRC decision may be appealed by a faculty member. Instead, as set forth at p. 6 of de Llano's Lodging, the NDSU policies allowed de Llano to appeal to the SCFR after the SRC had issued its recommendations irrespective of what was recommended by the SRC.

CONCLUSION

De Llano has failed to set forth any valid basis in his Petition for concluding that he was denied his federal procedural due process by NDSU or its Employees. De Llano has provided no basis that would justify a reversal or a remand of the Eighth Circuit Court of Appeal's determination. De Llano was given notice of the reasons for his termination on numerous occasions and was allowed to give his side of the story at least three different times. Accordingly, de Llano's Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
OCT 4 2002
OFFICE OF THE CLERK

NO. 02-242

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL DE LLANO, PETITIONER,

v.

DUANE BERGLUND, DAVID DANBOM, ALLAN G. FISCHER, MICHAEL GARRISON, RICK D. JOHNSON, ANDY KEOGH, JIM L. OZBUN, JIMMIE RICHARDSON, CHARLES A. SAWICKI, AND SHARON A. SIVERTS, RESPONDENTS

On Petition for a Writ of Certiorari To
The United States Circuit Court
for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

JOHN J. GOSBEE
Counsel of Record

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15 pp

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ARGUMENT IN REPLY

I. Introduction.

The question in this case is, "Can federal constitutional standards ever be met in an *ultra vires* proceeding?" Petition for Certiorari, at 1. NDSU Administrators never squarely answer the question, thereby implicitly conceding that an *ultra vires* proceeding does indeed violate federal constitutional standards.

Rather than answering the question posed, NDSU Administrators essentially argue: (1) Professor needed firing, it took us a lot of work, but we did it (Brief in Opposition, at 1-6, 12-15); (2) President Ozbun was not required to abide by the decision of the Special Review Committee (SRC) (*Ibid.*, at 15-20); and, (3) even if Ozbun was bound by the SRC's decision, there is no federal claim (*Ibid.*, at 6-11).

II. NDSU Administrators' Material Misstatement of the Record.

This petition hinges on whether actions taken after the SRC's decision were *ultra vires* and thus in violation of Professor's federally protected rights. On this important issue, NDSU Administrators misstate the record and falsely claim that Professor waived the issue. They contend:

> Since [Professor] did request a hearing before the SCFR, it is apparent that he acknowledged the non-binding nature of the SRC's recommendation and, thus, *waived any argument that the SRC's decision was final.*

Brief in Opposition, at 20, emphasis added.

Nothing could be further from the truth. Professor expressly reserved the issue when he requested the SCFR meeting:

> On August 27, 1994 I received a copy of the SCR Final Report ... .
>
> *As I have not heard from President Ozbun rescinding his "notice of Dismissal"* letter dated March 9, 1994, **I reluctantly ask you to convene the [SCFR]** to further consider my appeal dated 4/8/94.

Letter, Professor to Jay Leitch [Presiding officer of NDSU University Senate, and individual responsible for receiving SCFR meeting requests], September 9, 1994, emphasis added. Supplemental Appendix, SA2. As NDSU Administrators note, the SRC issued its decision on August 15, 1994. Brief in Opposition, at 3. Professor was faced with a 15-day deadline (measured from the date of receipt) to ask for a SCFR meeting. SBHE Policy Manual, §605(I)(7) (1994). Lodging, p. 6.

It is undisputed that Ozbun didn't tell Professor of Ozbun's decision to ignore the SRC until well after the 15-day deadline. Brief in Opposition, at 3, indicating that Ozbun "informed [Professor] that he was not adopting the SRC's recommendations" on September 22, 1994. Thus, unless Professor were to totally abandon the SCFR meeting, he had to trigger its beginning.

The situation is analogous to the practice, in some states, of a party preparing an adverse judgment in order to trigger the right to file an appeal. *See, e.g.*, Rule 58(a), 2nd ¶, NDRCivProc. Supplemental Appendix, at SA1. Serving notice of entry of

judgment is not construed as acquiescence in its tenor.

Further, in the footnote connected with that passage, NDSU Administrators claim:

> There is absolutely no reference in any NDSU policies stating that only an unfavorable decision SRC decision may be appealed by the faculty member. Instead, ... NDSU policies allowed de Llano to appeal to the SCFR ... irrespective of what was recommended by the SRC.

Brief in Opposition, at 20, n. 2. The reason for this supposed omission in the policy manual is plain – the Board had no need to state the obvious. A faculty member would have no reason to appeal a favorable decision of the SRC. Thus there was no reason to describe such a procedure.

III. This Court Needn't Decide Role of SRC.

NDSU Administrators contend that the SRC served only a mediation role. Brief in Opposition, at 15-20. In so arguing, NDSU Administrators misconstrue the role of this Court. "We ordinarily 'do not decide in the first instance issues not *decided* below.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S.103, ___, [slip opinion, at 5], (dismissing writ of certiorari as improvidently granted), emphasis added, citation omitted. As noted, neither the District Court nor the Court of Appeals decided this issue. Petition for Certiorari, at 10. Accordingly, this Court's role is appropriately limited to a remand to the lower court with directions to decide the issue and proceed accordingly.

IV. Ozbun Had no Authority to Ignore SRC.

Nonetheless, Professor believes it may be helpful to this Court to clarify the misunderstanding created by NDSU Administrators' analysis of the role of the SRC. Their analysis is based on Subsection A(3)(d) of the NDSU Faculty Manual. Brief in Opposition, at 16-17, citing Appendix pp. 225-226, 220-222, and 228-230.[1] NDSU Administrators do not address the language relied on by Professor – the part of the Manual setting out the steps to be followed when firing a tenured faculty member. Step 6 of the process allows the faculty member to ask for an SRC inquiry. SBHE Policy Manual, §605(I)(6). Lodging, at 6. The next step is: "If requested by the faculty member ... , formal hearing by the Standing Committee on Faculty Rights shall be provided under Section J." SBHE Policy Manual, §605(I)(7), emphasis added. Lodging, at 6.

NDSU Administrators' discussion of other parts of the manual is of no avail. This is a not particularly difficult issue of statutory construction. The plain meanings of the words are used. "[B]asic principles of statutory construction ... require giving effect to the meaning and placement of the words chosen by Congress." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 645 (1989). In plain words, for policy reasons not provided in the record, the State Board of Higher Education chose to omit any provision for anybody but the faculty member to appeal from the SRC's decision.

---

[1] There are no such page numbers in the Appendix filed with this Court. Rather, the citations of NDSU Administrators are apparently to the Appendix filed with the Eighth Circuit Court of Appeals.

Further, as noted, the State Board apparently changed its mind about the role of the SRC. Petition for Certiorari, at 14-17. If the rules were meant to read as NDSU Administrators contend, "there would have been no need to amend the Manual in 1995 to explicitly give [Ozbun] the authority to decide 'upon reconsideration.' " *Ibid.*, at 16.

V. *Loudermill* is not *Carte Blanche* to Ignore Constitution.

NDSU Administrators misconstrue *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), as standing for the proposition that violation of state-created remedies can never be a violation of federally protected rights:

> Guided by this Court's decision in *Loudermill*, appellate court's [*sic*] have uniformly concluded that the alleged failure of a state agency to follow its internal regulations ... does not amount, in itself, to a violation of federal due process rights.

Brief in Opposition, at 9.

Loudermill does not stand for the proposition that failure to provide a state-created process cannot violate federal rights. Rather, as this Court has said, the process, regardless of its derivation, must provide the faculty member a "*meaningful* opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998), emphasis added (citing *Loudermill*). And that brings us to Professor's contention: **By implicit definition, action taken *ultra vires* CANNOT provide a meaningful opportunity to be heard.**

Because Ozbun had no authority to ignore the SRC, all

actions taken after that were *ultra vires* and so violated federal constitutional standards. Although NDSU Administrators regale us with page upon page of events they contend provided due process, they cannot escape the fact that the critical events (namely the SCFR "hearing," Ozbun's final dismissal letter, and the appeal to the State Board) all occurred *after* the SRC decision, and were thus *ultra vires.*

VI. Let the Well Be Not Poisoned.

NDSU Administrators' presentation seems more designed to poison the well than to address the question posed by Professor. For example, Ozbun's asserted reasons for firing Professor (Brief in Opposition, at 1-2) have nothing to do with whether actions taken after the SCR decision were *ultra vires.* Professor is confident this Court will not so easily be misled, and will keep its eyes on the ball of whether an *ultra vires* proceeding can ever meet federal constitutional standards.

VII. Summary and Conclusion.

Professor's petition is limited to the issue of whether federal constitutional standards can ever be met by state officials acting *ultra vires.* Professor respectfully submits the only appropriate answer is "No." Accordingly, Professor asks that this Court grant the petition for certiorari and ultimately remand the case to the Eighth Circuit Court of Appeals for remand to the United States District Court for the District of North Dakota for a determination of whether the proceedings against Professor should have stopped with the SRC decision. If that answer is "Yes," Professor should be allowed to go forward to a trial on the merits as to whether NDSU Administrators conspired with each other to violate his constitutional rights.

Respectfully submitted on October 4, 2002.

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SUPPLEMENTAL APPENDIX

Rule 58(a), North Dakota Rules of Civil Procedure

(a) **Entry of Judgment.** Upon the filing of an order for judgment, the prevailing party shall submit to the clerk an appropriate form of the judgment. The clerk shall sign and file the judgment and make an entry of it in the register of civil actions, at which time the judgment becomes effective.

If the prevailing party fails to submit to the clerk an appropriate form of the judgment within 30 days after the order for judgment is filed, any party may submit an appropriate form without prejudice to any rights that party may have to challenge it.

If the judgment directs the payment of money in a sum certain, or which by calculation can be made certain, the clerk shall also docket the judgment in the judgment docket as provided by law.

SA 2

Letter, Manuel de Llano to Dr. Jay Leitch,
Presiding Officer, University Senate
North Dakota State University
September 9, 1994
[Exh. MdL-58 to Docket Item 62 in District Court Record]

Fax for Professor Jay Leitch
237-7400 3 pages
September 9, 1994

Dr. Jay Leitch
Presiding Officer
University Senate
NDSU

Dear Dr. Leitch:

On August 27, 1994 I received a copy of the SRC Final Report dated August 15, 1994 and addressed to you by Professor Donald R. Kirby, chair of the SRC.

As I have not heard from President Ozbun rescinding his "Notice of Dismissal" letter dated March 9, 1994, I reluctantly ask you to convene the Senate Standing Committee on Faculty Rights to further consider my appeal dated 4/8/94.

Though I appreciate the SRC's "Conclusions and Recommendations" (page 6 of above mentioned letter) finding no cause for the president's dismissal of me, I regret that your office was unable to relay to the administration my appeal dated June 29, 1994 to its sense of fairness to designate to the SRC a faculty member from outside my college, for obvious "conflict of interest" on my dean's part. As a result of this bias, the cited letter

contains some criticism of me that I would like to respond to for the record.

If the SRC found me "unnecessarily combative" and using the grievance process with "unusual [ ] frequency", it is because I have been, and continue to be, harassed by the administration: unjustified increased teaching loads; denial of further salary raises, of routine travel allowances, of out-of-state-travel authorizations, of the "privilege" of hosting outside visitors, of usage of departmental AT&T phone access number for international calls and faxes; I've also been threatened with denial of developmental leave, even when academically justified, and am now threatened with dismissal from the university.

In summarizing my career at NDSU (page 1), Dr. Kirby's letter does not mention: a) that I was tenured at the National University of Mexico; b) that the alleged letter to remove me as chair of the physics department, allegedly signed by all department members (the majority of whom were then non-tenured) was never shown me in the original, rather only in crumpled, Xeroxed form - - - I doubt the authenticity of any such letter; c) that the dean's 1st reprimand letter (dated 12/3/92) was based on a non-existent student "petition for a change of instructors", as explained in my response letter dated 3/25/93; that the 2nd reprimand letter dated 12/10/93 was followed by an E-mail message of mine to the dean inviting him that we discuss our disagreements over lunch, an invitation that was ignored by the dean; d)

[p. 2 of original]
that one of the departmental "censures" against me was for freely communicating with my college colleagues via a Memo dated 1/27/94 on matters of college concern; e) that during my chairmanship of the department it was revitalized with numerous

new hires, and reformed in terms of quality teaching, increased faculty scholarship, graduate-degree conferrals and grantsmanship, and that undergraduate majors enrollments rose by 50% (although they have since fallen to roughly the same level as when I came to NDSU).

Also, Dr. Kirby's letter (bottom of page 5) omits clarifying that it was the current chair's decision, not mine, to unilaterally open a new PHYS 121 section that he personally wound up teaching. In other words, it was the current chair's own "requirement" to teach an extra, and in my view unneeded, section. Nor does the letter mention that the current chair's dealing "on an on-going basis with [my] disagreements", which took "large amounts of time that could be put to more productive ends", was because I have been trying very hard to prevent further decline of our department to a scenario consisting of: i) typical introductory physics courses offered by the department containing no modern (i.e., 20th Century) physics, as opposed to most other institutions (including the local high schools!); ii) undergrad physics majors enrollments dropping from 21 in 1990-91 to 15 last AY; iii) faculty involvement in active research/service falling from 100% in 1988-89 to 50% in AY 1992-93; iv) in Spring 1990, fully 45% of total "merit" salary increase money was allocated to the research/service-inactive half of the department faculty; v) over the past two academic years, departmental teaching loads have been *increased* for several research/service-active faculty, and *decreased* for the chair (who has not published a paper in more than 5 years); vi) "prohibition" by both chair and dean to bring in self-funded foreign visitors to do collaborative research with faculty and students here; vii) recommendation by chair, without previous faculty discussion, for "professor emeritus" status of an early-retiring faculty member whose research record over the past eleven years consisted of one publication; and viii) habitual denial

of routine support services to some faculty, for personal reasons.

The letter further left out (top of page 6) the fact that: a) the "shortcomings in the teaching of one class" that I was accused of in the dean's reprimand letter of 12/3/92 were fully addressed in my letter of response dated 2/25/93; b) the "ethical violations in the publishing of what is alleged to be substantially the same article in two journals" (top of page 6) were cleared up in my 2-hour-long interview with the SRC on 7/20/94 when I offered Dr. Kirby, who declined, copies of those two articles, and I showed the SRC that though most of the contents of one article served as an introduction to the second article (presented as a talk at a workshop), that more than half of latter consisted of totally new material; c) that rather than "refusal to cooperate with colleagues in Departmental committee work" I have volunteered for numerous committees even while being dropped, one by one, from previous committees by the current chair.

[p. 3 of original]
Sincerely,
/s/
Manuel de Llano
Professor of Physics

copy. NDSU President Jim Ozbun
Mr. Michael Geiermann, ND Higher Education Association